IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

CO-1616-96

Royal Courts of Justice
Strand
London W2A 2LL

Tuesday, 29th July 1997

B e f o r e

MR JUSTICE SCOTT BAKER

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REGINA

v.

THE PARKING ADJUDICATOR

EX PARTE BEXLEY

- - - - - - -

(Computer Aided Transcription of the Stenograph Notes of
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Official Shorthand Writers to the Court)

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MR MICHAEL SUPPERSTONE QC and MR JONATHAN SWIFT (instructed by Chief Solicitor, Bexley Civic Offices, Bexleyheath DA6 7LB) appeared on behalf of the Applicant.

MR RICHARD GORDON QC and MR TIM WARD (instructed by Chief Adjudicator, Parking Committee for London, London SW1 4XP) appeared on behalf of the Respondent.

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J U D G M E N T
(As approved by the Court)

MR JUSTICE SCOTT BAKER: On 12th July 1995 Mr Monir Ali parked his car in the Bexley Council's off-street car park at Thanet Road. The tax disc had expired on 31st May 1995. One of the Council's parking attendants fixed a penalty charge notice to the vehicle. Mr Ali appealed to the Parking Adjudicator, who allowed his appeal because:

> "In my view, any Regulation requiring vehicles in off-street car parks to display a tax disc (which is not required under the Vehicle Licensing Legislation) is ultra vires and unenforceable."

The Council sought a review of the Adjudicator's decision, and on 24th February 1996 a different adjudicator upheld the original Adjudicator's decision, but on wider grounds. The Council now moves for judicial review pursuant to the leave of Popplewell J.

This case is of importance because other London boroughs, as well as several local authorities outside London, rely on similar legislation to control off-street parking. The short point is whether parking in such a car park without displaying a valid tax disc can lawfully attract a fixed penalty notice.

It is necessary to set out the relevant legislation in some detail. The Council's power to provide car parks is to be found in section 32(1) of the Road Traffic Regulation Act 1984. It provides insofar as is material:

> "Where for the purpose of relieving or preventing congestion of traffic it appears to a local authority to be necessary to provide within their area suitable parking places for vehicles, the local authority, subject to Parts I to III of Schedule 9 of this Act -
>
> (a) may provide off-street parking places ..."

By section 35 of the same Act the Council is entitled by order to make provision as to certain matters. Section 35(1) reads:

> "As respects any parking place -
>
> (a) provided by a local authority under section 32 ...
>
> the local authority ... may by order make provision as to -
>
> (i) the use of the parking place, and in particular the vehicles or class of vehicles which may be entitled to use it,
>
> (ii) the conditions on which it may be used,
>
> (iii) the charges to be paid in connection with its use (where it is an off-street one), and
>
> (iv) the removal from it of a vehicle left there in contravention of the order and the safe custody of the vehicle".

The most relevant of these is (ii), the conditions on which the car park may be used.

Section 66 of the Road Traffic Act 1991 gives a parking attendant power to fix a penalty charge notice to a vehicle

where he has reason to believe such a charge is payable. The relevant parts of this section provide:

> "(1) Where, in the case of a stationary vehicle in a designated parking place, a parking attendant has reason to believe that a penalty charge is payable with respect to the vehicle, he may -
>
> > (a) fix a penalty charge notice to the vehicle
> > ...
>
> (2) For the purposes of this Part of this Act, a penalty charge is payable with respect to the vehicle, by the owner of the vehicle, if -
>
> > (a) the vehicle has been left -
> >
> > > (i) otherwise than as authorised by or under any order relating to the designated parking place; or
> >
> > > (ii) beyond the period of parking which has been paid for;
> >
> > (b) no parking charge payable with respect to the vehicle has been paid; or
> >
> > (c) there has, with respect to the vehicle, been a contravention of, or failure to comply with, any provision made by or under any order relating to the designated parking place.
>
> (3) A penalty charge notice must state -
>
> > (a) the grounds on which the parking attendant believes that a penalty charge is payable with respect to the vehicle;
>
> ...
>
> (7) Schedule 6 of this Act shall have effect with respect to penalty charges, notices to owners and other matters supplementing the provisions of this section."

Schedule 6, paragraph 1 provides for the Council to serve notice on the owner if the penalty charge is unpaid after 28 days. Paragraph 2 provides for various matters that must be stated in the notice of the owner. These include:

> "(b) the grounds on which the parking attendant who issued the penalty charge notice believed that a penalty charge was payable with respect of the vehicle;
>
> ...
>
> (f) that the person on whom the notice is served ('the recipient') may be entitled to make representations under paragraph 2 [of the schedule]".

The material parts of paragraph 2 provide:

> "(1) Where it appears to the recipient that one or other of the grounds mentioned in sub-paragraph (4) below are satisfied, he may make representations to that effect to the London authority who served the notice on him.

...

(4) The grounds are -

(a) that the recipient -

(i) never was the owner of the vehicle in question;

(ii) had ceased to be its owner before the date on which the alleged contravention occurred; or

(iii) became its owner after that date;

(b) that the alleged contravention did not occur;

(c) that the vehicle had been permitted to remain at rest in the parking place by a person who was in control of the vehicle without the consent of the owner;

(d) that the relevant designation order is invalid".

The word "designation" was removed from this paragraph by paragraph 5(b) of the Road Traffic (Commencement No 12 and Transitional Provision) Order 1994.

Paragraph 2(7) imposes on the Council a duty to consider the representations and notify its decision. Paragraph 4 enables a person whose representations are not accepted to appeal to a parking adjudicator. Paragraphs 5(2) and (3) provide:

"(2) On an appeal under this paragraph, the parking adjudicator shall consider the representations in question and any additional representations which are made by the appellant on any of the grounds mentioned in paragraph 2(4) above and may give the London authority concerned such directions as he considers appropriate.

(3) It shall be the duty of any authority to whom a direction is given under sub-paragraph (2) above to comply with it forthwith."

Section 72 of the Road Traffic Act 1991 provides for the right of appeal to a parking adjudicator, and section 73 provides that an adjudicator requires a legal qualification. Detailed provisions about appeals to parking adjudicators are to be found in the Road Traffic (Parking Adjudicators) (London) Regulations 1993. It is unnecessary to refer to them in detail.

The London Borough of Bexley, purporting to act under section 35(1) of the Road Traffic Regulation 1984, made an order called the London Borough of Bexley (Off-street Parking Places) Order 1995. I shall refer to it as "the 1995 order". Paragraph 12 is headed "Parking without displaying a valid vehicle excise licence".

Paragraph 12 then reads:

> "The driver of a vehicle shall not permit that vehicle to wait in a parking place unless the vehicle is licensed in accordance with Section 1 of the Vehicle Excise and Registration Act 1994 and unless there is in relation to the use of the vehicle by the driver such a policy of insurance as complies with the requirements of Part VI of the Road Traffic Act 1988."

It will immediately be observed that paragraph 12 itself says nothing about displaying a valid vehicle excise licence.

Paragraph 16 provides:

> "If (a) a vehicle has been left (i) otherwise than as authorised by Article ... 12 of this Order or
> ...
> (c) there has, with respect to the vehicle, been a contravention of or failure to comply with the provisions of Article ... 12 of this order
>
> a penalty charge shall become payable ..."

Section 1 of the Vehicle Excise and Registration Act 1994, to which reference is made in paragraph 12, provides:

> "(1) A duty of excise ('vehicle excise duty') shall be charged in respect of every mechanically propelled vehicle which is used, or kept, on a public road in the United Kingdom and shall be paid on a licence to be taken out by the person keeping the vehicle."

So it provides for two things: (1) for the charging of excise duty in respect of a vehicle used or kept on a public road; and (2) for payment of that duty to be on a licence to be taken out by the keeper of the vehicle. Later legislation has, I think, provided for exemption of vehicles over 25 years of age. (See the Road Vehicles (Registration and Licensing) (Amendment) Regulations 1995.)

Paragraph 12 of the 1995 order lies at the very heart of this case. Its wording is in substantially the same form as that suggested in Department of Transport Circular 6/84, but the circular is, as Mr Gordon QC submits, of no legal force.

Mr Supperstone QC for the applicant Council pointed out to me that Parliament has decriminalised off-street parking penalties. This has two relevant consequences for present purposes: (1) the penalties are recoverable as civil debts in the County Courts; and (2) parking attendants, as agents of the Council, have the right to affix notices to vehicles if they believe a penalty is payable.

Various issues arise on this application:

1. Is paragraph 12 of the 1995 order *ultra vires*?

Section 32 of the Road Traffic Regulation Act 1984 is the source of the power for a local authority to provide off-street parking. Section 35 enables the local authority to make provision as to the use of the parking places they provide. Subsection 1 of section 35 is quite widely drawn. In particular, (2) enables the Council to impose conditions on which the parking place may be used. There is no express limit on the conditions.

Mr Gordon argues that the purpose of the powers granted relates to the regulation of parking and any regulations made under these powers must serve a parking purpose, for example duration of parking or size and weight of vehicles. Mr Supperstone, on the other hand, points out that if Parliament had intended to impose any limit on the ambit of the conditions that could be imposed, it would have said so. Accordingly, in making regulations under section 35, the only limit on the Council's power is that it must be exercised Wednesbury reasonably.

The evidence of Mr West explains the Council's reasons for the conditions in paragraph 12. He says, first of all, the Department of Transport's model for such regulations, circular 6/84, contained such a condition; and, secondly, the Council considered that the requirements of paragraph 12 were justified and relevant in that they promoted the safety of all persons, both drivers and pedestrians, using the car parks provided by the Council. This was simply on the basis that the fact that a vehicle has been properly taxed in accordance with the provisions of the 1994 Act is an indication of its roadworthiness in accordance with the requirements of an MOT test. Before a tax disc can be

purchased for any car more than two years old, the owner must be able to produce a valid MOT certificate. It is common ground that the relevant period is three years, not two years. Thus, it is contended the condition imposed by paragraph 12 of the 1995 order is directly concerned with the roadworthiness and hence safety of operation of the vehicle in terms of, for example, the condition of vehicle's brakes, steering, tyres, indicators and lights. The presence of a valid tax disc is also an indication that the vehicle is properly insured in respect of injuries or damage caused to third parties, because, once again, before a tax disc can be purchased the keeper of the vehicle has to present a valid certificate of the insurance.

A little later he continues:

> "Further, since ... the presence of a valid tax disc is a good indicator of the fact that the vehicle has been properly insured in relation to damage or injury suffered by third parties, this requirement in paragraph 12 of the 1995 Order also assists in keeping the Council free of liability to any person who suffers such loss and damage in one of the Council's car parks ..."

I am unimpressed by this reasoning. The existence or otherwise of a valid tax disc for a vehicle says very little about that vehicles roadworthiness. Various classes of vehicle, including those over 25 years old, do not require excise licences. The same is true of vehicles visiting from abroad. A valid MOT certificate is not a requirement for vehicles less than three years old. So whilst it may be true that some untaxed vehicles may also turn out to be unroadworthy, there are, I am sure, many unroadworthy vehicles that are validly licenced. Nor do I accept that a valid tax disc is a good indicator that the vehicle is properly insured. True it is that a current insurance certificate is necessary to tax a vehicle, but the insurance may run out long before the tax.

Mr Gordon puts it bluntly that paragraph 12 is seeking to drag the 1994 Act into an area with which Parliament never intended it should be concerned. The powers given under section 35 are for the regulation of parking and not to enable the Council (1) to police either the roadworthiness of vehicles or requirements as to the insurance of their drivers; or (2) to help ensure that vehicles are licensed. As McCullough J said in Cran v Camden London Borough Council [1995] RTR 346 at 347, when speaking of the Road Traffic Regulation Act 1984:

> "[It] is not a revenue raising Act. Where there is ambiguity the citizen is not to be taxed unless the language of the legislation clearly imposes the obligation."

There is no obligation under the criminal law for a vehicle to be taxed when it is in an off-street car park. Putting it another way, paragraph 12 is too oblique a means to enforce issues of roadworthiness, insurance and to raise revenue.

I have adverted to the lack of obligation for a vehicle to be licensed when in an off-street car park. Section 1 of the 1994 Act relates only to vehicles kept on a public road. The words "is licensed" in paragraph 12 refer to the present, ie the time when the vehicle is waiting in a parking place. I observe, incidentally, that obtaining a back-dated licence, as Mr Ali did, would not be the solution to any problem. There is no obligation under the vehicle licensing legislation for a vehicle left in a public off-street car park to be licenced. It may be said that the likelihood is that the vehicle could not have entered the car park had it not come by a public road.

Mr Gordon's response is that it is perfectly possible for the excise licence to have expired while the vehicle was parked. Paragraph 12 cannot be allowed, in effect, to extend the vehicle licensing legislation by a side wind. Whilst I have sympathy with the objectives of the Council, I do not think the legislation entitles it to achieve them.

One of the points I put to Mr Supperstone in argument was the position of an exempt driver. What is his position when the parking attendant fixes a penalty notice to his vehicle? On the face of the words of paragraph 12, a driver who parks an unlicensed vehicle is liable for the penalty, even if it is exempt. Mr Supperstone's answer was that the Council would withdraw the notice. A similar point can be made about a driver who, for some lawful reason, does not have a policy of insurance. This, in my judgment, is not the way to utilize legislation of a penal nature. This is a penal provision, albeit it has been decriminalised in the way I have described.

In my judgment, paragraph 12 is invalid because it was made outwith the powers pursuant to which it was made. It seeks to deal with matters outside the scope of the enabling legislation. In my judgment, the powers given by section 35 may only be used for a purpose connected with parking. Paragraph 12 goes beyond that. Mr Gordon succeeds on the *ultra vires* point. This, however, is not the only reason why this application for judicial review fails.

2. Wednesbury unreasonableness.

The second limb of the *ultra vires* point is that paragraph 12 is patently unreasonable in the Wednesbury sense. The enabling section entitles the Council to legislate for the conditions on which the off-street car park may be used. There is obviously some limit to the conditions that may be imposed. For example, no one could seriously suggest a condition prohibiting red-haired drivers would be valid. In my judgment, article 12 is Wednesbury unreasonable for two reasons. First, it imposes conditions that the parking attendant has no means of knowing whether or not they have been met, and, perhaps more importantly, he has no right to find out. The absence of a displayed tax disc may, and probably does, mean that the vehicle is unlicensed, but it may not. The parking attendant has no idea whether a driver who parks a vehicle is covered by a valid policy of insurance, and the driver is neither obliged to tell him nor to produce one. Secondly, the conditions appear, if they are complied with, to extend the ambit of the criminal law. The requirement to have a valid excise licence applies to a vehicle which is used or kept on a public road. An off-street car park is not a public road. Whether these reasons go to Wednesbury unreasonableness or to the article being outwith the powers under which it was made or both, is perhaps debatable; the result is the same, the article is *ultra vires.*

3. Was the Adjudicator entitled to decide that article 12 was *ultra vires*?

Mr Gordon submits that the Adjudicator was bound to decide on the validity of article 12 both when considering paragraph 2(4)(b) of schedule 6 (whether the contravention occurred) and 2(4)(d) (validity). Mr Supperstone contends that the Adjudicator exceeded his powers. He pointed out that the Adjudicator is limited in considering an appeal to the grounds set out in paragraph 4 of schedule 6. This, he says, contains an exhaustive list of the grounds on which a decision to issue a penalty notice may be challenged on an appeal. He argues that they all concern the determination of factual issues either as to the circumstances which led to the issue of the notice or as to whether the identity of the person to whom the notice should have been issued has been correctly determined. In particular, he

argues, an adjudicator is not entitled when determining an appeal to consider the *vires* of an authority to make particular parking regulations under section 35 of the 1994 Act. Such a point may only be raised on an application for judicial review.

Mr Gordon points out that the Adjudicator must be entitled to decide incidental questions of law, for example where the burden of proof lies. There is no right of appeal, he observes, by way of case stated. Furthermore, one of the express grounds is paragraph 2(4)(d), "that the relevant order is invalid".

Mr Supperstone says this only becomes relevant when the order in question (paragraph 12 in this case) has been declared invalid by a higher court and is therefore a pure question of fact. I cannot read paragraph 2(4)(d) in such a restricted way, for to do so would deprive it of meaningful effect. Of course the Adjudicator has no power to declare subordinate legislation invalid, nor is it contended that he has. Any decision of his on invalidity goes no further than the case before him. It may be persuasive, but it is not binding on other adjudicators. No doubt the answer is that once subordinate legislation has been questioned in this way a decision will be taken up on judicial review.

In paragraph 5 of his reasons the Adjudicator held that the statutory time limit for challenging the validity of article 12 applied in this case by virtue of part 6 of schedule 9 to the 1994 Act but that article 12 was nevertheless invalid. In paragraph 15 of his affidavit he accepts that the statutory time limit imposed by part 6 of the 1984 Act does not bite in this case. Both counsel accept that he is correct in this revised conclusion. There is therefore no statutory bar to his considering the question of *vires*.

One point faintly taken by Mr Supperstone was that paragraph 2(4)(d) of schedule 6 does not distinguish between the whole order and part of the order. In my judgment, there is nothing in this. It is perfectly clear that subordinate legislation can be *ultra vires* as to part only. The reference to "order" in this subparagraph is to the order, or that part of it on which reliance has been placed. In my judgment, the Adjudicator is given express power to consider *vires* in paragraph 2(4)(d), but even apart from that express power, it is my view that he would have been entitled to do so.

The law on collateral challenge often raises difficult and interesting questions. I was taken to the speeches in the House of Lords in R v Wicks [1997] 2 WLR 876. Lord Hoffmann said at page 892A:

> "The correct approach in my view is illustrated by the decision of the Divisional Court in Quietlynn v Plymouth City Council [1988] QB 114."

In that case Webster J had said that the question could be determined by the proper construction of the legislation in question.

Mr Supperstone argues that questions such as the validity of paragraph 12 are much better decided by judges with expertise in judicial review cases rather than parking adjudicators and that any way the adjudicator's decision could only be binding in the case under consideration.

My conclusion is that Parliament has entrusted the work of parking adjudicators to those who are legally qualified (section 73(4) Road Traffic Act 1991). They are unlike magistrates, who often have to consider the validity of bye-laws, and that on a true construction of schedule 6 they are entitled to consider the issues of collateral challenge that arose in this case.

4. Does the alleged contravention breach paragraph 12?

The penalty charge notice appears at page 80 of the bundle. It alleges that the parking attendant had reasonable cause to believe that the following parking contravention had occurred, and then the words:

> "88 Parked without displaying a valid vehicle excise licence (task disc)".

88 is, I understand, the number of the offence on a schedule provided to parking attendants.

The subsequent notice to Mr Ali issued on 10th August refers to the earlier penalty charge notice and says it was issued because the vehicle was allegedly involved in the following parking contravention, namely:

> "Parked without displaying a valid vehicle excise licence (task disk)".

Paragraph 12 is headed "Parking without displaying a valid vehicle excise licence", but the body of the paragraph says nothing about displaying a licence; it is concerned with the vehicle in fact being unlicensed and the driver being uninsured. Mr Supperstone argues that the requirements of section 66 entitling a parking attendant to fix a penalty charge notice to a vehicle are that he must have reason to believe that a penalty charge is payable. The absence of a tax disc is what gives him reasonable ground for believing that the vehicle is unlicenced, the latter being the ground justifying a fixed penalty notice. But the driver is entitled, in my judgment, to know what provision he has offended that requires him to pay a penalty. The notice tells him the offence was to park without displaying a valid tax disc. Suppose he had one but that his child had posted it into the windscreen demister slot, he would not have committed any contravention of paragraph 12 because he had a valid licence. In fact Mr Ali did not have a valid licence, but that is not the contravention alleged against him. This is a penal provision, and it is incumbent on the Council to state with clarity the particular provision of the 1995 order that has been broken. It failed to do so, and, in my judgment, no fixed penalty was payable.

Mr Gordon's next point is that it is common ground that the vehicle was not parked on a public road, therefore no excise duty was payable and accordingly there has been no breach of paragraph 12. Mr Supperstone argues that it is wrong to construe paragraph 12 on the basis that an offence under the 1994 Act is a precondition to any breach of paragraph 12. He argues that on its correct construction paragraph 12 of the 1995 order is infringed in any situation where no licence has been purchased under section 1 of the 1994 Act.

A literal approach to paragraph 12 suggests that Mr Supperstone is correct, but, in my judgment, the point is really subsumed in the *ultra vires* point.

Conclusion.

The Council's application for judicial review fails. Paragraph 12 of the 1995 order is *ultra vires* because it is outwith the power given to the local authority to enact it. It is also Wednesbury unreasonable, the grounds overlap. Even were paragraph 12 *intra vires* and valid, the Council would not succeed on this application because the fixed penalty

notice alleged no ground that contravenes paragraph 12. In my view, the Parking Adjudicator was entitled to consider the *vires* in paragraph 12 and he correctly concluded that it was *ultra vires.*

MR GORDON: My Lord, I have an application for costs.

MR SUPPERSTONE: I cannot resist that, my Lord.

MR JUSTICE SCOTT BAKER: You will have your costs, Mr Gordon.

MR SUPPERSTONE: My Lord, I do apply for leave to appeal. Your Lordship has appreciated that this case raises a number of important issues. The issues which, in our submission, are certainly worthy of consideration by the Court of Appeal are twofold. First, the issue of parking adjudicators' powers, and in particular whether they have an express power, which my Lord found that they do have, to rule on the *vires* of orders, such as the one in issue in the present case, or, alternatively, whether they have power to consider lateral challenge. My Lord, secondly, the *vires* of condition 12 of the 1995 order. As my Lord, has noted, all London councils, to the best of our knowledge, have that condition in similar orders, and a few outside London. My Lord, in those circumstances it is plainly a matter of some significance.

MR JUSTICE SCOTT BAKER: Mr Gordon?

MR GORDON: My Lord, it is obviously a matter for the court, but, in our submission, although points of importance have been raised, this case fails on a knockout blow. That is the first point. Secondly, in view of the express wording of 2(4)(d), one really does question whether it is a case that should trouble the Court of Appeal. Whether your Lordship says that Mr Supperstone should go to the Court of Appeal to seek leave is obviously a matter for the court.

MR JUSTICE SCOTT BAKER: I do not normally grant leave; I normally leave it to the Court of Appeal to take a view as to the appeals that they wish to hear. On the other hand, it seems to me that in this case there are issues that go wider than the instant case. I bear in mind what Mr Gordon says about the knockout blow. I also bear in mind that this is the end of term and you are likely in any event to take the matter through the procedure in the Court of Appeal. I think I shall give you leave.

MR SUPPERSTONE: My Lord, I am grateful.
